Re Udos ak Riging, ex p Seabanc Kredit Sdn Bhd

HIGH COURT (KUCHING) — BANKRUPTCY PROCEEDING NO 95 OF 1994 (II)
ABDUL KADIR SULAIMAN J
21 JUNE 1994

Bankruptcy *— Notice — Setting aside — Whether notice based on 'final judgment' — Whether default judgment was final if debtor's application to set aside not heard yet — Whether application to set aside defective if it applied for additional matters not contained in Form 7 — Bankruptcy Act 1967 ss 3(1)(i), 105 & 131 — Bankruptcy Rules 1969 rr 18(1) & 95*

The petitioner, Seabanc Kredit Sdn Bhd, obtained judgment in default pursuant to O 28 r 6(1)(a) of the Subordinate Courts Rules 1980 ('the SCR') against the debtor and another person. The debtor applied to set aside the judgment. While awaiting the hearing of the application, the petitioner served a bankruptcy notice on the debtor. The debtor filed an affidavit in the High Court under r 95 of the Bankruptcy Rules 1969 ('the Rules') to have the bankruptcy notice set aside on the ground, inter alia, that his application to set aside the judgment had not yet been heard. The magistrate dismissed the debtor's application to set aside the judgment and he appealed to the High Court, where the appeal is still pending. The petitioner objected to the present application on the grounds that: (i) the application prays for matters other than that provided by Form 7 to the Rules and the proper procedure is by way of a summons under r 18(1) and not affidavit; and (ii) the judgment was a final judgment and the debtor had not applied for a stay of execution.

Held, setting aside the bankruptcy notice:

(1) Under r 95 of the Rules, the filing of the affidavit by the debtor operates as an application to set aside the bankruptcy notice. The defect of having additional grounds in the application was not prejudicial to the petitioner. It was a mere irregularity which did not render the proceedings to set aside the notice void and was saved by s 131 of the Bankruptcy Act 1967 ('the Act').

(2) Under s 3(1)(i) of the Act, a bankruptcy notice is to issue only on a final judgment or order where execution has not been stayed. For the purpose of bankruptcy proceedings, a default judgment is not final because it is not decided on the merits. Any judgment not given on merit is liable to be set aside on application and does not finally dispose of the rights of the parties.

(3) If the debtor had not appealed within time, the default judgment would have crystallized into a final judgment. However, in this case, the debtor had filed his application to set aside the default judgment within time and the judgment would only be final after

he had exhausted his remedy given by law. The issue of a stay of execution would only be relevant if the default judgment was final. Therefore, pursuant to r 98 of the Rules, no act of bankruptcy was committed by the debtor under the notice.

[Bahasa Malaysia summary

Pempetisyen, Seabanc Kredit Sdn Bhd, telah memperolehi penghakiman ingkar di bawah A 28 k 6(1)(a) Kaedah-Kaedah Mahkamah Rendah 1980 ('KMR itu') terhadap penghutang dan seorang yang lain. Penghutang telah memohon untuk mengetepikan penghakiman itu. Semasa menunggu pendengaran permohonan itu, pempetisyen telah menyampaikan satu notis kebankrapan kepada penghutang. Penghutang telah memfailkan satu afidavit di Mahkamah Tinggi di bawah k 95 Kaedah-Kaedah Kebankrapan 1969 ('Kaedah-Kaedah itu') untuk mengetepikan notis kebankrapan itu atas alasan, antara lain, bahawa permohonan beliau untuk mengetepikan penghakiman itu belum lagi didengar. Majistret telah menolak permohonan penghutang untuk mengetepikan penghakiman itu dan beliau telah membuat rayuan ke Mahkamah Tinggi, di mana rayuan beliau masih belum selesai. Pempetisyen telah membantah terhadap permohonan sekarang atas alasan bahawa: (i) permohonan itu memohon untuk perkara yang tidak terkandung di dalam Borang 7 kepada Kaedah-Kaedah itu dan prosedur yang betul adalah melalui suatu saman di bawah k 18(1) dan bukannya melalui afidavit; dan (ii) penghakiman itu adalah suatu penghakiman muktamad dan penghutang tidak memohon untuk penggantungan pelaksanaan.

Diputuskan, mengetepikan notis kebankrapan itu:

(1) Di bawah k 95 Kaedah-Kaedah itu, tindakan memfailkan afidavit oleh penghutang beroperasi sebagai suatu permohonan untuk mengetepikan notis kebankrapan itu. Kecacatan dalam bentuk mengandungi alasan tambahan di dalam permohonan itu tidak memudaratkan pempetisyen. Ia hanya merupakan suatu luar aturan yang tidak menjadikan prosiding untuk mengetepikan notis kebankrapan itu terbatal dan ia diselamatkan oleh s 131 Akta Kebankrapan 1967 ('Akta itu').

(2) Di bawah s 3(1)(i) Akta itu, sesuatu notis kebankrapan hanya boleh dikeluarkan berdasarkan suatu penghakiman atau perintah muktamad di mana pelaksanaannya tidak digantung. Bagi tujuan prosiding kebankrapan, sesuatu penghakiman ingkar tidak muktamad kerana ia tidak diputuskan atas merit. Sebarang penghakiman yang tidak diberikan atas merit boleh diketepikan apabila permohonan dibuat dan tidak menentukan hak pihak-pihak secara muktamad.

(3) Jika penghutang tidak membuat rayuan dalam had masa yang ditetapkan, penghakiman ingkar itu akan menjadi suatu penghakiman muktamad. Bagaimanapun, di dalam kes ini,

penghutang telah memfailkan permohonannya untuk mengetepikan penghakiman ingkar itu dalam masa yang ditetapkan dan penghakiman itu akan menjadi muktamad hanya selepas beliau telah menghabiskan remedi yang diberikan kepadanya di sisi undang-undang. Isu mengenai penggantungan pelaksanaan hanya menjadi relevan jika penghakiman ingkar itu adalah muktamad. Oleh itu, mengikut k 98 Kaedah-Kaedah itu, tidak ada tindakan kebankrapan yang dilakukan oleh penghutang di bawah notis itu.]

Notes

For cases on setting aside a bankruptcy notice, see 1 *Mallal's Digest* (4th Ed) paras 1044–1049, 1075–1076; [1989] Mallal's Digest 71; [1991] Mallal's Digest 122–126; [1992] Mallal's Digest 99–108.

For cases on what constitutes final judgment, see 1 *Mallal's Digest* (4th Ed) paras 1059–1060.

Cases referred to

Cheong Kong Enterprise Co Sdn Bhd v Foong Seong Mines Ltd & Ors [1969] 2 MLJ 246 (refd)

JKR Leonard v Official Assignee [1941] MLJ 30 (folld)

Riddel ex p Earl of Strathmore, Re (1888) 20 QBD 512 (folld)

Sovereign General Insurance Sdn Bhd v Koh Tian Bee [1988] 1 MLJ 304 (distd)

Subramaniam, A v Muthiah Chetty, SMRM [1934] MLJ 222 (refd)

Tractors (M) Bhd v Charles Au Yong [1982] 1 MLJ 320 (distd)

Walter Su ex p United Malayan Banking Corp Bhd, Re [1987] 1 MLJ 44 (distd)

Legislation referred to

Bankruptcy Act 1967 ss 3(1)(i), 105, 131

Bankruptcy Rules 1969 rr 18(1), 95

Subordinate Courts Rules 1980 O 28 r 6, O 29 r 4

Walter Dior (*Dior & Co*) for the debtor.

Arthur Lee (*Arthur Lee, Lin & Co*) for the petitioning creditor.

Ko Fui Loong for the Official Assignee.

Abdul Kadir Sulaiman J: This is an application by the debtor to set aside the bankruptcy notice issued against him at the instance of the judgment creditor. I heard the application and on 17 June 1994 delivered an oral judgment setting aside the said bankruptcy notice. I now give my reasons for so doing.

By a magistrates' court order dated 28 January 1994, judgment in default pursuant to O 28 r 6(1)(a) of the Subordinate Courts Rules 1980 (hereinafter referred to as 'the SCR') was entered for the plaintiff on

11 January 1994 against the first and second defendants in Summons No M–72–26–93(A) for the sum of RM10,181.86 together with interest on the sum of RM22,344.46 at the rate of 24% pa from 20 July 1993 to the date of judgment and thereafter at the rate of 8% pa from the date of judgment till full and final payment and contractual costs on a solicitor-client basis in the sum of RM2,021. On 1 March 1994, the second defendant applied that the said judgment be set aside. This application was made within the time period allowed by O 29 r 4 of the SCR, ie within 30 days from the date of the receipt of the order or judgment. The second defendant received the order on 9 February 1994. There was no stay of the execution of the default judgment. While waiting for the hearing of the application, the plaintiff on 18 March 1994 requested for the issue of a bankruptcy notice against the second defendant enclosing a sealed copy of the judgment dated 28 January 1994 above-mentioned. A bankruptcy notice was accordingly issued on the same day against the second defendant demanding a total payment of RM15,116.83 being the amount outstanding as at that date, to be paid within seven days after service of the notice. The said notice was served on the second defendant on 28 March 1994.

On 31 March 1994, the second defendant (henceforth to be referred to as 'the debtor') filed an affidavit to have the bankruptcy notice issued by the plaintiff (henceforth to be referred to as 'the judgment creditor') set aside intimating that his application to have the said judgment set aside was fixed for hearing on 31 May 1994 and that he has a counterclaim against the plaintiff which he could not have set up in the action in which the said judgment was obtained. The judgment creditor filed an affidavit in reply affirmed by Charlie Kho Chung Hong, its credit controller, on 16 May 1994 deposing that to date there has been no application for an order of court to stay execution on the said judgment and that the allegation about the counterclaim has no basis in law. On 7 June 1994, the learned magistrate heard the debtor's application to set aside the default judgment and dismissed the application of the debtor. On 9 June 1994, the debtor filed an appeal with the High Court against the decision of the learned magistrate disallowing his application. The appeal is pending in the High Court.

Under r 95 of the Bankruptcy Rules 1969 (hereinafter referred to as 'the Rules'), the filing of the affidavit by the debtor operates as an application to set aside the bankruptcy notice. At the hearing of this application, the learned counsel for the judgment creditor objected to the procedure adopted in making this application as the application prays for additional matters than are provided by Form 7 to the Rules. He says that the proper procedure would be by way of a summons as provided by r 18(1) of the Rules. I see no merit in the objection by the learned counsel for the judgment creditor on grounds of procedure as the essence of the application is to have the bankruptcy notice set aside and if it is defective on account of having additional grounds in the application, it will not in any way be prejudicial to the judgment creditor. At the most it was a mere irregularity which would not render the proceedings to set aside the bankruptcy notice

A void and is saved by s 131 of the Bankruptcy Act 1967 (hereinafter referred to as 'the Act').

In essence, by his application, the debtor is saying that since the matter concerning the default judgment against him is pending in the High Court, the default judgment is not a final judgment. It will be a final B judgment only when it is finally determined. The issue is very relevant because if the debtor is correct in his argument, the bankruptcy notice issued against him on 18 March 1994 is misconceived and therefore, must be set aside. So this application calls for me to decide whether the default judgment at the time of the issue of the bankruptcy notice was a final judgment. Under s 3(1)(i) of the Act, a bankruptcy notice is to issue only C on a final judgment or final order and execution thereon not having been stayed.

Having considered the matter, the authorities and the submissions by both the counsel, I am of the view that, for the purpose of bankruptcy proceedings so as to avoid the possible conflict which I will explain later in D the judgment, the default judgment at the time of the issue of the bankruptcy notice, which in this case was on 18 March 1994, is not a final judgment. This is so because, the judgment being a default one owing to the absence of the debtor at the hearing of the suit by the judgment creditor against him is not a judgment on the merit. Any judgment given not on merit is liable to be set aside on an application made. If that be so, the default E judgment when entered did not finally dispose of the rights of the parties. In this case O 29 of the SCR allows the debtor to do so within the period of 30 days. If he does not do so, then and only then, the said default judgment would crystallize into a final judgment. If this happens, after the expiration of these 30 days, the judgment creditor is entitled to request for F a bankruptcy notice to be issued. However, in this case, the debtor within time had filed his application to have the said default judgment set aside. On 7 June 1994, the learned magistrate heard the debtor's application to set aside the default judgment and the application was dismissed. If this matter rested there, then the original default judgment became a final judgment. But it did not, for on 9 June 1994 the debtor exercised his right G provided by law by filing an appeal with the High Court against the decision of the learned magistrate disallowing his application. So by the act of the debtor challenging the default judgment made against him, at that stage the judgment did not become final as yet. So the issue of a bankruptcy notice pursuant to that judgment would not as yet have arisen. H In my view, the said judgment will only be a final one after the debtor has exhausted his remedy given by law. I find support in the dicta of Lord Esher MR in *Re Riddel ex p Earl of Strathmore* (1888) 20 QBD 512 where at p 516 he said:

> ... in my opinion, 'a final judgment' means a judgment obtained in an I action by which the question whether there was a pre-existing right of the plaintiff against the defendant is finally determined, in favour either of the plaintiff or of the defendant. I think that definition will be found to cover most cases, though perhaps not every one.

> ... In my opinion the question is, not only was the claim determined, but was it finally determined? It can only have been finally determined if between the two parties to the action it cannot be raised again.

The operative words in the dicta are 'finally determined'. For so long as the debtor has not fully exhausted his remedy, the fate of the default judgment is not finally determined. As far as the learned magistrate is concerned, it may be said that his decision is final for he was functus officio. But for the debtor and the judgment creditor, the matter can hardly be said to be finally determined at that stage. The test in *Re Riddel ex p Earl of Strathmore* (1888) 20 QBD 512 received the approval of our Federal Court in *Cheong Kong Enterprise Co Sdn Bhd v Foong Seong Mines Ltd & Ors* [1969] 2 MLJ 246, even though not a decision in a bankruptcy matter. This same test was also applied by our Court of Appeal in *JKR Leonard v Official Assignee* [1941] MLJ 30, a bankruptcy matter, that an order which is liable to be varied cannot possibly be a final order as it does not finally dispose of the right of the parties. This principle, in my view, equally applies to a default judgment which is liable to be set aside.

If it is to the contrary in that the said default judgment became a final judgment the moment the order of the court of 28 January 1994 was extracted, there is bound to be a confusion in the event that the appeal of the debtor is allowed by the High Court later on and the default judgment given by the learned magistrate is set aside. In that event, there is no judgment entered against the debtor upon which a bankruptcy notice is to issue. But on the other hand, in the bankruptcy court, the bankruptcy notice was issued pursuant to the default judgment which was construed as a final judgment. Failure on the part of the debtor to comply with the notice during the requisite period, would be presumed to be an act of bankruptcy on his part which would form a basis for a bankruptcy petition by the judgment creditor which would subject the court to the making of a receiving order and adjudicating order thereby adjudging the debtor a bankrupt. No doubt under s 105 of the Act, an application can be made to annul the adjudicating order made against the debtor on the ground that he ought not to have been adjudged bankrupt. But a prejudice had been caused to the innocent debtor which, to my mind, is not the intention of the legislature to create such a state of confusion.

In support of his contention that the default judgment in this case is a final judgment, the learned counsel for the judgment creditor cited the case of *A Subramaniam v SMRM Muthiah Chetty* [1934] MLJ 222 by saying that an order on the face of it is good, made by a competent authority and it must be deemed to be good until it is set aside by whatever procedure as may be prescribed or allowed by law. There is no quarrel about that provided the debtor did nothing to pursue his right given by the law. But the debtor here did not sleep on the matter. Therefore, before his objection is finally adjudicated upon, there is no right in the judgment creditor to request for the issue of the bankruptcy notice under the Act.

It is not in dispute that upon the entering of the default judgment, the debtor did not ask for the stay of the execution of that judgment. For

A that the learned counsel for the judgment creditor contends that the judgment has become final. No authority was however given in support of the contention. I see no merit in saying so in the light of the further steps taken by the debtor to have the said judgment set aside. However, the issue of no stay of the execution will be relevant only if in the first place that default judgment is a final judgment in the context of the issue of the B bankruptcy notice.

Next, the learned counsel cited the case of *Sovereign General Insurance Sdn Bhd v Koh Tian Bee* [1988] 1 MLJ 304 as laying down the principle that in exercising jurisdiction in bankruptcy, the judge cannot go behind the judgment by disputing validity of orders when orders have not been set C aside. Indeed it is true, but by saying that the default judgment in this case is not a final judgment, I am not in any way going behind the judgment in coming to the conclusion whether the default judgment is a valid judgment or otherwise. What I am saying is the default judgment is being questioned by the debtor through the proper legal process. I would not know what the D outcome of his appeal to the High Court [would be] in regard to the dismissal of his application to set aside by the learned magistrate. The course he has taken is allowed by law. So, until there is finality on the issue, the said default judgment cannot, at the date of the issue of the bankruptcy notice, be termed as final judgment for the purpose of s 3(1)(i) of the Act. At any rate the fact in the case above-quoted can be easily E distinguished from the present matter before me. There the judgment (not clear whether default judgment or judgment on merit) was obtained in January 1976. No step was taken to have the said judgment set aside or appealed against. In November 1980, after a lapse of more than four years, a bankruptcy notice was issued. From the facts, it is clear that by November F 1980 the said judgment must necessarily be a final judgment as no step was taken to challenge the judgment when given in January 1976.

Next is the case of *Re Walter Su ex p United Malayan Banking Corp Bhd* [1987] 1 MLJ 44 where the application of the debtor to set aside the bankruptcy notice was dismissed. One of the grounds for the application was that an appeal was pending against the summary judgment of the G learned registrar. It was held, inter alia, that the mere fact that an appeal is pending over the judgment is not a sufficient ground for staying the proceedings upon the petition of the creditor. It was further held that the court of bankruptcy will not, as a matter of course, enquire into the validity of a judgment debt, but only when there is evidence that a judgment had H been obtained by fraud or collusion, or that there has been some miscarriage of justice. With respect, that case is easily distinguished from the present on the facts of the case. The facts were clearly laid out at p 45 of the judgment of the learned judge. At the same page Mohamed Dzaiddin J (as he then was) had this to say:

I > These events are highlighted to show the bona fide of the appeal against the O 14 judgment. In fact, on 30 April 1984 I heard an application by the debtor for stay of both execution and bankruptcy proceedings pending appeal. After submission of counsel, I dismissed the application on ground that the appeal was not made bona fide.

However, in the present case the debtor is actively pursuing his rights under the law to have the default judgment set aside and it is through no fault of his that the matter is not yet resolved one way or the other as at the date of the issue of the bankruptcy notice. The holding of the default judgment as a final judgment at the present stage may cause some miscarriage of justice for the reason I stated earlier in the event the High Court decision in his appeal is in his favour.

The case of *Tractors (M) Bhd v Charles Au Yong* [1982] 1 MLJ 320, next cited by the counsel for the judgment creditor is again easily distinguished because there the debtor made no attempt to apply to the court to set aside the default judgment, though he had plenty of time to do so. So it could not any longer be disputed that the default judgment there entered was not a final judgment.

So, for the reason stated, I have no alternative but to find for the debtor/applicant and the bankruptcy notice is accordingly set aside as I am satisfied that the judgment in default given on 11 January 1994 by the learned magistrate in the circumstances, is not a final judgment for it does not as yet finally dispose of the rights between the debtor and the judgment creditor. Pursuant to r 98 of the Rules, I declare that no act of bankruptcy has been committed by the debtor under the notice.

Costs of this application to the debtor to be taxed unless agreed.

Application allowed.

Reported by Anne Khoo